No. 85632

IN THE SUPREME COURT OF MISSOURI
EN BANC

LOUISE OBERMEYER, et al.,	)
	)
Plaintiffs/Appellants,	)
	)
vs.,	)
	)
BANK OF AMERICA, N.A., et al.,	)
	)
Defendants/Respondents.	)

Appeal from the Circuit Court of the City of St. Louis

The Honorable Timothy Wilson
Circuit Judge

Substitute Brief of Respondent Washington University

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Table of Contents

Table of Contents....1

Tables of Cases and Other Authorities....3

Jurisdictional Statement....6

Statement of Facts....7

Points Relied On....15

I. The Trial Court Correctly Entered Judgment For The University, Because The Cy Pres Doctrine Permitted The Trial Court To Apply Dr. Kimbrough's Trust To An Endowed Chair In The Medical School, In That The Text Of His Trust And The Surrounding Circumstances Demonstrate That Dr. Kimbrough Had A General Charitable Intent. 15

Argument 16

I. Standard Of Review. 16

II. The Cy Pres Doctrine....18

III. Cy Pres In The Instant Case 20

A. Intrinsic Evidence – The Text Of The Trust. 21

B. Extrinsic Evidence – The Surrounding Circumstances. 30

IV. Plaintiffs' Arguments. 35

A. Plaintiffs' Legal Authorities....35

B. Plaintiffs' Factual Arguments. 39

Conclusion.....43

Table of Cases and Other Authorities

Cases

Buchweiser v. Estate of Laberer,

695 S.W.2d 125 (Mo. banc 1985) 6

Coleman v. Haworth,

8 S.W.2d 931 (Mo. 1928) 19

Comfort v. Higgins,

576 S.W.2d 331 (Mo. banc 1978) 15, 18, 26, 28, 30-31, 32-33, 35-36

Curators of the University of Missouri v. University of Kansas City,

442 S.W.2d 66 (Mo. banc 1969) 15, 21-22, 30

Ellis First Nat'l Bank v. United States,

550 F.2d 9 (Ct. Claims 1977) 34

Estate of Coleman,

584 P.2d 1255 (Kan. App. 1978) 37-38, 39

Evans v. Grove Iron Works,

982 S.W.2d 760 (Mo. App. 1998) 7

First Nat'l Bank of Kansas City v. Jacques,

470 S.W.2d 557 (Mo. 1971) 15, 19, 20, 22-23, 24, 26-27

First Nat'l Bank of Kansas City v. Stevenson,

293 S.W.2d 362 (Mo. 1956) 16, 19, 34

In re H.M.C.,

11 S.W.3d 81 (Mo. App. 2000) 17, 39

Heintz v. Woodson,

714 S.W.2d 782 (Mo. App. 1986) 16

In re Morrissey,

684 S.W.2d 876 (Mo. App. 1984) 31

Langdon v. United Restaurants, Inc.,

105 S.W.3d 882 (Mo. App. 2003) 16

Levings v. Danforth,

512 S.W.2d 207 (Mo. App. 1974) 19-20, 24

Mullenix-St. Charles Properties v. City of St. Charles,

983 S.W.2d 550 (Mo. App. 1998) 35

Murphy v. Carron,

536 S.W.2d 30 (Mo. Banc 1976) 16

Ramsey v. City of Brookfield,

237 S.W.2d 143 (Mo. 1951) 15, 18, 27-28

Reed v. Eagleton,

384 S.W.2d 578 (Mo. 1964) 20

State ex rel. Nixon v. Hutcherson,

96 S.W.3d 81 (Mo. banc 2003) 43

Strother v. Barrow,

151 S.W. 960 (Mo. 1912) 18, 37

Thatcher v Lewis,

76 S.W.2d 677 (Mo. 1934).....20, 24, 35

Vollmann v. Rosenburg,

972 S.W.2d 490 (Mo. App. 1998).....35, 36-37

Weatherwax v. Reading,

953 S.W.2d 162 (Mo. App. 1997).....17

Wollen v. DePaul Health Center,

828 S.W.2d 681 (Mo. banc 1992).....40

Other Authorities

Mo.R.Civ.P. 84.04(c).....7

Restatement (Second) of Trusts, § 399, comment c, d, i (1959).....27, 31, 32, 34

IVA Scott on Trusts, § 399.2 and 399.3 (4th Ed. 1989).....19, 21, 22, 27, 32

Jurisdictional Statement

Respondent Washington University agrees that this Court has jurisdiction of this appeal following the order transferring it from the Court of Appeals. The Court decides a transferred case as though it were a direct appeal from the trial court. Buchweiser v. Estate of Laberer, 695 S.W.2d 125, 127 (Mo. banc 1985).

Statement Of Facts

Appellants' 25-page statement of facts bears no resemblance to the "fair and concise statement of the facts relevant to the questions presented" required by Rule 84.04(c). It is repetitive; it is argumentative; it is cluttered with irrelevant detail. Its most fundamental problem, however, is that it takes the evidence in the light most favorable to the appeal – exactly the opposite of what the Rule requires. Evans v. Grove Iron Works, 982 S.W.2d 760, 762 (Mo. App. 1998).

1. The Parties.

Plaintiff Louise Obermeyer resides at 21 Black Creek Lane, which is located in Ladue, Missouri. L.F. 21-22. She is the daughter of Margaret Towles Derrick, Tr. 21, whose great uncle was Dr. Joseph B. Kimbrough. Tr. 18. Dr. Kimbrough was therefore Ms. Obermeyer's great, great uncle.

Plaintiff Elizabeth Salmon resides in Sedgwick County, Kansas, L.F. 22, which is the greater Wichita area. She is the daughter of Harvey W. Salmon. Tr. 54. Dr. Kimbrough was also Mr. Salmon's great uncle. App. A8. Dr. Kimbrough was therefore Ms. Salmon's great, great uncle.

Washington University is a tax-exempt charitable institution of higher learning located in St. Louis. Tr. 1-2. The Honorable Jeremiah W. Nixon is a party in his capacity as Attorney General and representative of the public interest. The Bank of America is the trustee of the trust at issue. L.F. 23.

2. The Grantor.

Dr. Kimbrough was born in 1870. P.Ex. 5. In 1890, he entered the Missouri Dental College from which he graduated in 1894. P.Ex. 4. By the time of his graduation, Washington University had acquired the Dental College so his degree was from Washington University. Tr. 5. Dr. Kimbrough also served on the faculty at the Washington University Dental School. Tr. 5. He was proud of being a dentist and proud of the Dental School. Tr. 50; 60.

During his later years, Dr. Kimbrough made numerous gifts to the University. D.Ex. A-K. Sometimes those gifts were to the Washington University Dental Alumni Development Fund, sometimes to the University's Century Fund. One $100 gift went to the University's Medical School Alumni Fund. All of these gifts were unrestricted, meaning that the University could use the money as it pleased. S.L.F. 19-20.

Plaintiffs attribute these gifts to a fund-raising campaign begun in 1953 by some alumni of the Dental School. It is certainly true that the November 1954 edition of the Washington University Dental Journal announced the formation of the Washington University Dental Alumni Development Fund. D.Ex. L. According to the Dental Journal, the purpose of this Fund was to provide financial support for the Dental School and to improve the morale of the Dental School's faculty. There is no evidence that Dr. Kimbrough ever read that article or that the fund-raising campaign inspired him to make the contributions he made.

The names that the University attaches to its various fund-raising efforts "have changed frequently over the years." S.L.F. 23. The Dental Alumni Development Fund subsequently became part of the University Alumni Giving Fund. Tr. 87.

Plaintiffs also assert that Dr. Kimbrough was "very close" to his family and that the two appellants "enjoyed a warm familial relationship" with him. Br. at 10. The record does not support these allegations. Ms. Salmon only saw Dr. Kimbrough once or twice a year during the last ten years of his life, Tr. 59, and he left her nothing in his will. The closest that Ms. Obermeyer could come was that she "always saw him at holiday time and interestingly as I got older and could drive I would go see him, he was a lot of fun to be with." Tr. 18. She was only 18 in 1963 when her 93-year old great, great uncle died. P.Ex. 9. She had never seen his office, Tr. 19, and he left her $5,000. P.Ex. 3 at 2

3. Dr. Kimbrough's Estate Plan.

On October 23, 1945, Dr. Kimbrough created a trust into which he transferred a number of stocks and bonds. P.Ex. 1. At the time of his death, most of Dr. Kimbrough's assets were in that trust. P.Ex. 32. This trust reserved a life estate to Dr. Kimbrough. If his brother were to survive Dr. Kimbrough, the brother then received a life estate. On the death of both Dr. Kimbrough and his brother, the trust assets were to be distributed free of trust to his half sister and his great nieces and great nephews. P.Ex. 1.

On September 29, 1954, Dr. Kimbrough amended the trust. The 1954 amendment provided that any estate or inheritance taxes assessed against his estate should be borne pro rata by the trust and by his probate estate. P.Ex. 1.

On September 23, 1955, Dr. Kimbrough amended the trust a second time. This amendment also reserved a life estate for Dr. Kimbrough. Upon his death, his two surviving great nephews and his surviving great niece received a life estate in the trust. The remainder went to the University:

> (c) Upon the death of the survivor of said niece and nephews and after the death of the Grantor, the property then constituting the trust estate shall be paid over and distributed free from trust unto Washington University, St. Louis, Missouri, for the exclusive use and benefit of its Dental Alumni Development Fund.

P.Ex 1. The parties stipulated that this was a valid charitable trust. Tr. 1-2.

The record contains two wills executed by Dr. Kimbrough. The 1959 will makes various bequests to family and friends, each of which was conditioned on that person surviving Dr. Kimbrough; otherwise, the bequest reverted to his residuary estate. P.Ex. 2. It provides a $2,000 bequest for the League of the Hard of Hearing. The residuary legatee is the University, again for the "exclusive use and benefit of its Dental Alumni Development Fund." Neither of the latter bequests has a reverter clause.

Dr. Kimbrough executed his final will in 1962. P.Ex. 3. The principal change from the 1959 will was that he substituted his great niece, Margaret

Derrick, if living, for the University as the residuary legatee. Once again, each of the individual bequests contained a reverter clause and the charitable bequests did not.

4. The Closing Of The Dental School.

In 1989, the University decided to close the Dental School. P.Ex. 17. During the 1980's, there was an oversupply of dentists and applications to dental schools fell precipitously. Tr. 240. That decline affected private schools such as Washington University even more than public schools because of the higher cost of tuition at private schools. Tr. 241.

The University considered other options. The status quo was impractical since it would have required continued tuition increases that would further reduce applications. Tr. 80. A minimum of $6 million per year in increased outside funding would have been necessary to avoid tuition increases. Id. Other options were even more expensive. Tr. 80-81.

The closing of the Dental School did not mean an end to the functions that the School had performed. The Dental School had three such functions: treating patients in clinic, educating dental students, and research. Tr. 242. All three continue today. Richard Smith, the last dean of the Dental School and chairman of its orthodontics department, became a professor of anthropology at the Hilltop Campus. Tr. 238-39. Under his direction, "there are [sic] very large number of

aspects of dental research going on on the Hilltop Campus in my department and elsewhere in the university." Tr. 243.

Dr. Donald Huebener, formerly a professor at the Dental School, transferred to the University's School of Medicine. Tr. 167. He is a board certified pediatric dentist and he works at Children's Hospital. Tr. 168-69. From a patient care perspective, "[w]hen the school closed I continued at the hospital doing mainly the same things that I had previously done without the dental undergraduate dental students." Tr. 169. He also continues to teach dental medicine to "general practice residents in dentistry." Tr. 170.

Dr. Donald Gay was chairman of the Maxillofacial Prosthetics department at the University's Dental School. Tr. 286. When the Dental School closed, he transferred to Washington University's School of Medicine where he is now director of the division of Maxillofacial Prosthetics in the Otolaryngology department. Id. "[E]xcept for contact with dental students what I do now is exactly what I did at the dental school." Id. He also supplies prosthetic services to patients in conjunction with the otolaryngology residency training program. Tr. 287.

As the trial court found, App. A10, "dental medicine is still a necessary component of Washington University Medical School." The exhibits that the trial court reviewed demonstrated the "[b]orderline miraculous healing work" that the University's professors continue to perform. Id.

The School of Medicine also maintains two collections of dental books and journals that it inherited from the Dental School. The Sternagel collection consists of about 75 journals and 1300 dental books, Tr. 270, and both students and faculty make regular use of it. Tr. 270-71. The McKellops collection consists of 750 rare books about dentistry, one of the finest rare book collections of dental materials in the United States. Tr. 272.

5. Proceedings Below.

Dr. Kimbrough died in 1963 at the age of 93. Tr. 27. The last of the life tenants, Margaret Towles Derrick, died in September 2000 at the age of 91. Id. Plaintiffs filed suit to enjoin the Bank from distributing the trust assets to the University, and for declaratory judgment that the trust assets belonged to them, either as Dr. Kimbrough's heirs at law or through the residuary clause in the will. L.F. 21. The University urged the trial court to apply the cy pres doctrine and award the trust funds to the University. L.F. 180.

Plaintiffs and the University each filed a motion for summary judgment. The Honorable Julian Bush denied both motions on the ground that "the intent of Dr. Joseph P. Kimbrough" was "a material issue of fact" that was "in genuine dispute." L.F. 10.

The case then proceeded to trial before the Honorable Timothy Wilson, who found in favor of the University. The trial court found, as a matter of fact, that Dr. Kimbrough had a general charitable intent "to further education and dental

medicine at Washington University." App. A12. The trial court further found, as a matter of fact, that there was "no evidence that Dr. Kimbrough wanted his gift so narrowly drawn and so inflexible that if it could not be used in a specifically named fund, it should lapse." Id.

The trial court therefore ordered that the trust fund assets be paid to the University to establish an endowed chair in Dr. Kimbrough's name in either the Cleft Palate/Craniofacial Deformities Institute or the Department of Otolaryngology, or both. App. A-13-14.

Points Relied On

I. **The Trial Court Correctly Entered Judgment For The University, Because The Cy Pres Doctrine Permitted The Trial Court To Apply Dr. Kimbrough's Trust To An Endowed Chair In The Medical School, In That The Text Of His Trust And The Surrounding Circumstances Demonstrate That Dr. Kimbrough Had A General Charitable Intent.**

- Comfort v. Higgins, 576 S.W.2d 331 (Mo. banc 1978)
- Curators of the University of Missouri v. University of Kansas City, 442 S.W.2d 66 (Mo. banc 1969)
- First Nat'l Bank of Kansas City v. Jacques, 470 S.W.2d 557 (Mo. 1971)
- Ramsey v. City of Brookfield, 237 S.W.2d 143 (Mo. 1951)

Argument

I. Standard Of Review

The doctrine of cy pres applies when it becomes impossible or impracticable to carry out a grantor's particular charitable purpose and the grantor manifested a general intention to devote his trust funds to charitable purposes. In those circumstances, the trial court may direct the application of the trust funds to alternate uses conforming to that general intent.

The ultimate issue in any cy pres case is "the real intent of the testator." First Nat'l Bank of Kansas City v. Stevenson, 293 S.W.2d 362, 366 (Mo. 1956). Plaintiffs' brief admits as much. Br. at 34. Plaintiffs are entitled to recover only if Dr. Kimbrough specifically intended that the trust fail if the University closed the Dental School.

Intent is a question of fact. See Langdon v. United Restaurants, Inc., 105 S.W.3d 882, 889 (Mo. App. 2003) (appellate court "must defer to the factfinder's determination" on the intent of the parties to a lease); Heintz v. Woodson, 714 S.W.2d 782, 784 (Mo. App. 1986) ("[c]onsidering the standard of review . . . we cannot say the trial court erred in finding the intent to purchase").

The relevant criteria under Murphy v. Carron, 536 S.W.2d 30 (Mo. banc 1976), therefore, are the first two: whether "there is no substantial evidence" to sustain the judgment and whether the judgment "is against the weight of the evidence." Id. at 32. Review of a fact-based challenge to the judgment in a court-tried case is deferential indeed:

> The appellate court will defer to the trial court's determination of credibility and to its resolution of conflicts in the evidence. The facts and reasonable inferences therefrom are reviewed in the light most favorable to the trial court's order. The evidence and permissible inferences favorable to the judgment are accepted as true and all contrary evidence and inferences are disregarded.

In re H.M.C., 11 S.W.3d 81, 86 (Mo. App. 2000) (citations omitted).

It may be, as plaintiffs argue, Br. at 6, that no deference is owed a judgment based solely upon the construction of unambiguous documents. That rule is irrelevant. As explained in Point II, Missouri courts apply the cy pres doctrine based on all of the relevant facts and circumstances – not just the language of the instrument making the grant.

This judgment rests on oral testimony and the inferences to be drawn therefrom at least as much as it does on the text of Dr. Kimbrough's trust. In those circumstances, the appellate court does defer to the trial court's ruling. The Court presumes that all fact issues as to which the trial court made no explicit finding support the judgment. Weatherwax v. Reading, 953 S.W.2d 162, 167 (Mo. App. 1997). For example, this Court should assume that the trial court did not credit plaintiffs' self-serving testimony about the closeness of their relationship with Dr. Kimbrough, because that assumption is most favorable to the judgment.

Finally, as explained in Point II, there is a strong presumption in favor of charitable trusts and therefore in favor of applying the cy pres doctrine. Evidence

that the trust fails must therefore be "of a stringent and conclusive character, leaving no reasonable loophole for escape from the conclusion." Strother v. Barrow, 151 S.W. 960, 963 (Mo. 1912).

As a result, plaintiffs must prove that the trial court had to find, by clear and convincing evidence, that Dr. Kimbrough intended that the trust fail if the University closed the Dental School – and that no reasonable trial judge could find otherwise.

II. The Cy Pres Doctrine.

The issue in this case is whether Dr. Kimbrough had a general or a specific charitable intent. "A general charitable intent exists in any case where there is an intent to assist a certain general type or kind of charity," such as education in dental medicine. Ramsey v. City of Brookfield, 237 S.W.2d 143, 145 (Mo. 1951). A grantor's intent is specific when the grantor intended to "aid that kind of charity only in a particular way or by a particular method or means," and further intended that, "if the particular means failed, the gift failed." Comfort v. Higgins, 576 S.W.2d 331, 338 (Mo. banc 1978) (emphasis original) (citations and internal punctuation omitted).

There is a strong presumption in favor of general charitable intent. Because "charitable trusts are favorites of equity," they are:

> construed as valid and given effect wherever possible, by applying the most liberal rules of which the nature of the case admits and are often upheld where private trusts would fail.

First Nat'l Bank of Kansas City v. Stevenson, 293 S.W.2d 362, 367 (Mo. 1956) (citations and internal punctuation omitted). Accord, First Nat'l Bank of Kansas City v. Jacques, 470 S.W.2d 557, 561 (Mo. 1971) ("courts will strive to uphold the validity of a charitable trust within the general intent of the donor"); Levings v. Danforth, 512 S.W.2d 207, 209 (Mo. App. 1974) (equity has "great concern" to "protect and preserve charitable bequests"). Whenever possible, therefore, the court "has the power (and indeed, the duty) to apply the cy pres doctrine." Id. at 211.

Plaintiffs cite Coleman v. Haworth, 8 S.W.2d 931 (Mo. 1928), for the proposition that a testator's blood relatives "are favorites of the law and entitled to first consideration in doubtful expressions." Br. at 53-54. The parties to that lawsuit were testator's daughter and several unrelated remaindermen, not charitable trusts. Stevenson, Jacques and Levings all involved charitable trusts on the one hand and the grantor's heirs at law on the other. In those circumstances, the law favors the charitable trust.

Ordinarily, the grantor "does not contemplate the possible failure of his particular purpose." IVA Scott on Trusts, § 399.2 at 490 (4th Ed. 1989). Thus, the Court must determine what the grantor "would have intended if he had thought about the matter." Id. Accord, Levings, 512 S.W.2d at 211 (the "basic equitable

problem is, what would Carpenter desire if he knew that his trust purposes could not be carried out").

As a result, courts do not determine intent based solely or even primarily on the four corners of the grant. Nor do courts generally allow particular words in the grant to dictate the outcome. Instead, Missouri courts "consider 'the whole instrument in light of all the circumstances" in determining the grantor's intent. Jacques, 470 S.W.2d at 560 quoting Thatcher v Lewis, 76 S.W.2d 677, 682 (Mo. 1934).

This sort of broad-reaching inquiry is essential to determine what Dr. Kimbrough would have done had he foreseen the closing of the Dental School:

> The result of too strict adherence to the words of the testator often means the defeat rather than the accomplishment of his ultimate purpose. He intends to make the property useful to mankind, and to render it useless is to defeat his intention.

Reed v. Eagleton, 384 S.W.2d 578, 588 (Mo. 1964).

III. Cy Pres In The Instant Case.

Dr. Kimbrough died in 1963 and the Dental School closed in 1991. The ultimate issue is what Dr. Kimbrough would have done had he known that the Dental School would close nearly thirty years after his death. Plaintiffs claim that he would have wanted the money to go to his great, great-nieces. The text of Dr. Kimbrough's trust and the surrounding circumstances support the trial court's

factual finding that Dr. Kimbrough would instead have wanted the gift to continue to support education in dental medicine at Washington University.

A. Intrinsic Evidence – The Text Of The Trust.

The best evidence that Dr. Kimbrough did not intend his gift to revert to his heirs if the Dental School closed is that the trust instrument does not so provide:

> In the absence of such a provision, . . . it is rarely held that the trust fails altogether because of the impossibility of carrying out the specific directions of the testator, where the trust was a permanent trust and the impossibility was due to circumstances happening after the trust had been created.

IVA Scott on Trusts, § 399.3 at 518.

This Court's two opinions involving the transfer of the assets of the University of Kansas City to the University of Missouri at Kansas City illustrate this rule. In Curators of the University of Missouri v. University of Kansas City, 442 S.W.2d 66 (Mo. banc 1969), the grantor left $100,000 to the University of Kansas City for scholarships and the residue to the University's endowment. Her will further provided:

> If the University of Kansas City should cease to exist (an event which I do not anticipate and trust shall never occur) then and in that event both the 'Lena Haag Fund for Deserving Students' and the 'Lena Haag Endowment Fund for the University of Kansas City' shall thereupon be paid and

> distributed by the Trustees hereinbefore referred to, to the Board of Trustees (or other governing Board occupying a similar position) of Park College of Parkville, Missouri . . . .

442 S.W.2d at 68.

This Court held that the grantor's intent was specific, because the will directly addressed the situation that arose and specified the consequences:

> The language used by Ms. Haag . . . shows that while she thought it unlikely that U.K.C. would cease to exist, she had the possibility in mind and provided what should be done if it occurred. . . . "If the testator makes an express provision as to the disposition of the property in case the particular purpose fails, that provision is controlling."

442 S.W.2d at 72 quoting Scott. Of course, Scott also plainly says that, "[i]n the absence of such provision," the trust "rarely" fails. IVA Scott, § 399.3 at 518.

In Jacques, the will directed the trustee to pay the remainder to the trustees of the University of Kansas City to support grants or loans to University students. After the University's assets were transferred to the University of Missouri system, the grantor's heirs relied on Curators to argue that the trust had failed. This Court rejected the argument:

> The substance of the holding in that case was that within the meaning of the will, the University of Kansas City had ceased to exist, and that when there was an express intention on the part of the testator that in such event the bequest should go to Park College, that intent should be carried out. In this

> case, however, there was no gift over, and the cy pres doctrine is applicable in order to carry into effect the intention of the Decedent as nearly as may be done.

470 S.W.2d at 561-62.

Thus, if the grantor foresaw the contingency that actually arose and addressed it directly, the instrument controls. If the grantor did not foresee the contingency, his or her intent is presumptively general. Nothing in Dr. Kimbrough's trust addresses what would happen if the Dental School closed, so the Court should presume that his intent was general.[1]

Second, Dr. Kimbrough made his gift to the University, not to the Dental School. P.Ex. 1 at 2. Dr. Kimbrough knew the difference between the University and the administrative subdivisions called its schools. If Dr. Kimbrough "intended his trust to benefit the Dental School . . . and not Washington University as a whole," as plaintiffs assert, Br. at 63, he would have made the gift to the Dental School and specified that no other administrative unit of the University could use it.

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[1] Without benefit of supporting authority, plaintiffs argue that the Court should "create a reversion in the testator's heirs" if the instrument does not "specifically provide for an alternative disposition." Br. at 53. This has the law just exactly backwards.

It is no accident that Dr. Kimbrough left the remainder of his trust to the University. The formal title of the Development Fund was the **Washington University** Dental Alumni Development Fund. D.Ex. L (emphasis added). The gift was to the University for the benefit of "its" – i.e., the University's – Dental Alumni Development Fund.

As the trial court held, App. A11, the identity of the beneficiary "is evidence that the Trust was intended for Washington University." That is an important element in analyzing the grantor's intent based on the terms of the grant. In Jacques, this Court held:

> [T]he University of Kansas City was not the beneficiary of the trust created by the will. The beneficiaries were "students of the undergraduate, graduate, or postgraduate departments of said university" who were to receive "grants or loans" payable from the income of the trust property.

470 S.W.2d at 560.

Third, as the trial court held, App. A-11-12, the absence of a reverter clause in Dr. Kimbrough's trust is clear evidence that his intent was general rather than specific. Thatcher, 76 S.W.2d at 683 ("[t]he idea that he meant it to be permanently applied to this problem is strengthened by the fact that his will shows no intention that it should ever revert to his heirs"); Levings, 512 S.W.2d at 211 (will "made no provision for the reversion" to testator's heirs "of the corpus of the trust if its purposes failed").

On the contrary, the 1955 amendment is clear evidence that Dr. Kimbrough did not want his heirs at law to receive the principal amount of the trust. Prior to that amendment, Dr. Kimbrough directed that his then-living direct heirs receive an aliquot share of the principal after he and his brother were dead. The 1955 amendment gave those heirs only a life estate. After that, the principal was to be paid to the University.

Dr. Kimbrough clearly knew what a reverter clause was and how to provide one. Every bequest in his will to a relative, friend or employee contained a reverter clause; if the legatee was not living on the date Dr. Kimbrough's death, the bequest reverted to his residuary estate. P.Ex. 2-3. None of the charitable bequests in his will or his trust contain such a clause.

Plaintiffs argue that the 1962 will replaced the University as residuary legatee with his grand niece, Margaret Derrick. Br. at 52-53. From that, they leap to the conclusion that, in drafting his trust instrument seven years earlier, Dr. Kimbrough intended the trust to revert to her if the Dental School were ever closed. Br. at 70. This conclusion simply does not follow from the premise.

All that the 1962 will proves is that Dr. Kimbrough wanted the residue of his estate, whatever that may have been, to go to his great-niece instead of the University. That he made no similar change in the trust suggests that his intentions about the latter remained unchanged.

Moreover, the residuary legatee clause sheds no light on Dr. Kimbrough's intentions with respect to the trust. The clause merely allows his great-niece to

inherit whatever the residue of his estate may have been. That is completely irrelevant to whether he would have wished the gift to fail upon the closing of the Dental School.

Finally, the gift to the University was not in trust. In Comfort, this Court held that "the language and terms of the trust itself indicate specific intent" because the "gift was made in trust, rather than outright." 576 S.W.2d at 339. The instant case presents the opposite scenario and hence requires the opposite inference.

To be sure, the property was in trust during the relevant life estates. But the amendment specifically provides that the distribution to the University shall be "free from trust." P.Ex. 1 at 2. And even with the restrictive language on which plaintiffs rely, the gift was unrestricted: the dean of the relevant school could use the funds for whatever purpose he or she chose. Supp. L.F. 19-20. Thus, plaintiffs' argument that the existence of a trust implies specific intent, Br. at 54-55; 66, is completely mistaken.

Plaintiffs' principal textual argument, repeated many times, is that the gift to the University was "for the exclusive use and benefit" of the "Dental Alumni Development Fund." P.Ex. 1 at 2. Br. at 37; 49-50; 51-52; 54; 65-66. Equating that Development Fund with the Dental School, they argue that the Fund could serve no purpose once the Dental School closed. Br. at 65; 71-72.

There are a variety of problems with this argument. For starters, it purports to resolve the entire case based on a single phrase in the trust instrument – directly

contrary to this Court's instructions to consider "the whole instrument in light of all the circumstances" in determining the grantor's intent. Jacques, 470 S.W.2d at 560.

It is hornbook law that "exclusive purpose" clauses like this one do not necessarily establish specific charitable intent:

> The mere fact . . . that it is provided by the terms of the trust that the property shall be devoted "forever" to a particular purpose, or that it shall be devoted to that purpose and "no other purpose" . . . does not necessarily indicate the absence of a more general charitable intention of the settler; it . . . does not necessarily indicate an intention that the trust should terminate if it should become impossible or impracticable or illegal to carry out the particular purpose.

Restatement (Second) of Trusts, § 399 comment c. Accord, Scott on Trusts, § 399.2 at 499 (same).

In Ramsey v. City of Brookfield, 237 S.W.2d 143 (Mo. 1951), this Court followed that rule. The grantor left the residue of her estate to the City of Brookfield "for the sole purpose of building and equipping and maintaining a City hospital." The hospital was to be within the City and the bequest was to "be used for hospital purposes and no other." 237 S.W.2d at 144. This Court rejected an argument that this language "clearly and forcefully eliminate[d] any reasonable basis for a claim of general charitable intent." Id. at 145:

> [T]hese provisions do not necessarily show absence of a general charitable intent. They may emphasize an intention that the trust property be used in the specified means as long as practicable and possible. Such provisions do not, ipso facto, show an intent that the trust should cease in the event of impossibility or impracticability of using the specified means.

Id. at 146.

This holding is completely inconsistent with plaintiffs' argument that the word "exclusively" establishes specific charitable intent for all time. Ramsey held that language of even greater force and clarity and even more specific application – "for the sole purpose of building and equipping and maintaining a hospital" and "no other" – does **not** necessarily exclude general charitable intent, when the other evidence indicates such intent.

Plaintiffs claim that the "paramount" fact in Ramsey was that the testator had specifically excluded her heirs in her will, and that Comfort distinguished the case based primarily on that fact. Br. at 44-45. That is simply not a fair reading of Comfort. This Court distinguished Ramsey on at least five other grounds: the length of time that had elapsed since the gift; the grant of land rather than cash or marketable securities; the absence of a reverter clause; the gift was made in trust rather than outright; and the other language in the trust instrument. 576 S.W.2d at 338-39. Those distinctions simply underscore this Court's consistent holding that cy pres cases depend on the totality of the circumstances rather than a single phrase.

Moreover, the record does not support plaintiffs' repeated argument that the Dental Alumni Development Fund could serve no purpose once the Dental School closed. Like the Annual Fund, the Dental Alumni Development Fund sought unrestricted contributions to the University. Supp. L.F. 23. An unrestricted gift "can be spent in any way that the university wants, and designating a particular school "does not change the nature" of an unrestricted gift. Supp. L.F. 19-20. That has "always been the case for unrestricted funds." Supp. L.F. 53.

In the normal course, an unrestricted gift to a particular school would be used for that school. Supp. L.F. 53. When the University closes or consolidates one of its administrative units, "those funds could be spent elsewhere." Id. The University could also spend unrestricted gifts to one school on another school if there were a joint program. Supp. L.F. 54. Thus, the Development Fund was simply a device to hold the funds contributed by Dr. Kimbrough and others until the University decided what to do with them.

The only record support for plaintiffs' equation of the Dental Alumni Development Fund with the Dental School is D.Ex. L, the November 1954 edition of the Washington University Dental Journal that outlined the purposes of the Fund. According to the Dental Journal, as of 1954, those purposes were to provide financial assistance to maintain the operations of the Dental School at a high level and to provide a morale boost to the faculty.

Contrary to plaintiff's unsupported allegation, Br. at 64, the existence of the Dental School as a separate administrative unit of the University is unnecessary to

achieve either purpose. The University has continued to maintain at a high level many of those dental research and education functions; it has merely transferred them to the School of Medicine. Tr. 169-70; 191; 242-43. The faculty who perform those functions would obviously find their morale boosted by the use of Dr. Kimbrough's trust to endow a chair as Dr. Huebener requested and the trial court directed. Tr. 175.

In any event, the trial court was not required to treat two sentences out of a 50-year-old dental journal as controlling of Dr. Kimbrough's intent. If Dr. Kimbrough really did mean for his gift to be used exclusively to support the Dental School, and to revert to his heirs if that school closed, one would have expected him to say so in so many words. One would not place conclusive importance on an article that Dr. Kimbrough may or may not have even read.

Taken as a whole, the intrinsic evidence of the text of the trust clearly supports the trial court's factual finding that Dr. Kimbrough had a general rather than a specific charitable intent.

B. Extrinsic Evidence – The Surrounding Circumstances.

In any cy pres case, "some extrinsic evidence must be admitted . . . to enable the court to apply the words of the will to the matters to which it relates." Curators, 442 S.W.2d at 69 (citations and internal punctuation omitted). In Comfort, for example, in determining whether the grantor's intent was specific or general, the Court considered extrinsic evidence before it even discussed the terms

of the trust. 576 S.W.2d at 338-39.[2] The extrinsic evidence in the instant case supports the trial court's factual finding that Dr. Kimbrough's charitable intent was general.

First, the length of the time between the execution of Dr. Kimbrough's trust and the closing of the Dental School suggests a general charitable intent. "Courts are more willing to find a general intent where a trust has been successfully implemented for a long period of time." Comfort, 576 S.W.2d at 338:

> The court can fairly infer an expectation on the part of the settlor that in course of time circumstances might so change that the particular purpose could no longer be carried out, and that in such a case the settlor would prefer a modification of his scheme rather than that the charitable trust should fail and the property be distributed among his heirs who might be very numerous and only remotely related to him.
>
> . . . . The longer the period between the creation of the charitable trust and the failure of the particular purpose, the more undesirable it is that the property should revert to the settlor's estate.

Restatement, § 399 comment i.

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[2] Plaintiffs cite In re Morrissey, 684 S.W.2d 876 (Mo. App. 1984), for the proposition that courts can consider extrinsic evidence only if a will is ambiguous. Br. at 65. Morrissey did not involve application of cy pres, so it is not in point.

That rule clearly applies to the instant case. The plaintiffs are the great, great nieces of Dr. Kimbrough – distant relatives indeed. Ms. Salmon only saw him once or twice a year during the last ten years of his life, Tr. 59, which may explain why he left her nothing in his will. Ms. Obermeyer's testimony on this point is hardly a model of clarity:

> I always saw him at holiday time and interestingly as I got older and could drive I would go see him, he was a lot of fun to be with.

Tr. 18. That hardly bespeaks a close personal relationship with Dr. Kimbrough. She had never seen his office, Tr. 19, and the $5,000 bequest he left her is a small fraction of his estate. In the absence of more specific testimony, the trial court was free to conclude that the relationship between Ms. Obermeyer (age 19 at the time) and Dr. Kimbrough (age 93) was not close.

Plaintiffs claim that the length of time between the gift and the closing of the Dental School makes no difference, because the trust has not yet been used for charitable purposes. Br. at 56. They cite no authority for that proposition, and Scott directly rejects it. American courts are **more** likely "to apply the cy pres doctrine" when the purpose of a charitable remainder trust fails during a life tenancy than when "the purpose fails at the death of the testator." IVA Scott § 399.3 at 526. Under the Restatement, it is the lapse of time that makes it "undesirable" that the property revert to the heirs at law or the residuary legatee.

Second, the gift was cash and marketable securities, not land that had been in the family for decades. As this Court held in Comfort:

In the present case, the trust property was the land settled by the settlor's father. This fact has been construed by some courts as strong evidence of the absence of general charitable intent.

576 S.W.2d at 338.

Third, Dr. Kimbrough was a frequent and generous donor of unrestricted funds to the University. Between 1954 and 1963, Dr. Kimbrough made 11 contributions totaling $1,200 to the University:

Date	**Amount**	**Beneficiary**
1954	$200	Alumni Fund – unrestricted
1955	$100	Medical School
195x	$100	Second Century Fund
1956	$100	Second Century Fund
1956	$100	Second Century Fund
1958	$100	Alumni Fund – unrestricted
1958	$100	Alumni Fund – unrestricted
1959	$100	Alumni Fund – unrestricted
1960	$100	Alumni Fund – unrestricted
1961	$100	Century Club– Dental School
1961	$100	Century Club – Dental School
1963	$100	Century Club – Dental School

D.Ex. A-K. In considering the size of these contributions, the Court should bear in mind that a 1955 dollar was worth almost seven times what it is today.

The "character of the charitable gifts previously made" by the grantor is a highly relevant fact in determining his general intent. Restatement § 399 comment d. As the trial court held, these other gifts to the University – all unrestricted and many for purposes unrelated to dentistry – are also clear extrinsic evidence of his general charitable intent. See First Nat'l Bank of Kansas City v. Stevenson, 293 S.W.2d 362, 367 (Mo. 1956) (testator's "paramount religious interest" was his church, such that his "primary intent and concern was to make wise and generous provision for the future financial welfare of that church").

Finally, under the tax law in effect before 1969, virtually all charitable remainder trusts – like Dr. Kimbrough's – provided substantial tax savings to the grantor's estate. See Ellis First Nat'l Bank v. United States, 550 F.2d 9, 11-12 (Ct. Claims 1977) (describing the law before the 1969 amendments to the Internal Revenue Code). The 1954 amendment to the trust is proof that Dr. Kimbrough (or his attorney) was aware of the tax consequences of his estate plan. P.Ex. 1. Since the remainder interest in favor of the University (as opposed to his heirs at law) was essential to these tax savings, it is clear evidence of his general charitable intent.

All of this evidence supports the trial court's factual finding that Dr. Kimbrough's "gift was not made to accomplish one particular objective within a

given period of time," but would instead "support education and research at Washington University in disciplines related to dentistry." App. A12. Under the deferential standard of review afforded to the trial court's factual findings, this evidence alone requires the Court to affirm.

IV. Plaintiffs' Arguments.

Plaintiffs' often repetitive brief presents a number of reasons why they believe the trial court should have weighed the evidence differently. An appellate court does not "reweigh the evidence." Mullenix-St. Charles Properties v. City of St. Charles, 983 S.W.2d 550, 555 (Mo. App. 1998). Thus, even on their face, plaintiffs' arguments do not warrant a reversal.

A. Plaintiffs' Legal Authorities.

Plaintiffs rely principally upon Comfort and Vollmann v. Rosenburg, 972 S.W.2d 490 (Mo. App. 1998). According to plaintiffs, the trial court misapplied the law by failing to follow these cases. Br. at 41. Plaintiffs fail to acknowledge that "no general rule can be enunciated as to the manner in which the cy pres doctrine will be applied, but each case must necessarily depend upon its own peculiar circumstances." Thatcher, 76 S.W.2d at 682 (citations and internal punctuation omitted). Thus, their effort to convert factual findings into errors of law must fail.

In any event, both the text of the trusts and the surrounding circumstances in those cases are quite different from the instant case. In Comfort, the instrument

required the trustees to establish "a farm Home for aged men and aged women" and to name that home after the grantor's father. 576 S.W.2d at 334. This Court held that this language evidenced "a specific intent to create a Home . . . in memory of her father." Id. at 339:

> For the settler to have evinced a general intent, she would have stated that to the end and purpose of helping the aged she wished to set up the Home, rather than the converse as was here done. . . . Here the setting up of the Home, as described, was an end, not a means.

Id.

Dr. Kimbrough's trust is the exact opposite. He left his gift to the University, which clearly implies a general intent to benefit the University. Only after he had made clear his gift to the University did he add any qualifying language, and that language specified no particular application of the gift. As previously explained, the exclusive purpose language on which plaintiffs rely does not prevent a finding of general intent.

Comfort also relied on four other items of intrinsic and extrinsic evidence: time elapsed after the grant; a grant of land instead of cash or marketable securities; the absence of a specific reverter; and the grant was made in trust. 576 S.W.2d at 338-39. As explained, in the instant case, all four of those items favor a finding of general intent.

Vollmann is even less instructive. While the court of appeals did state that the grantor had a specific intent, 972 S.W.2d at 492, that intent was not at issue on

the appeal. The issue of specific intent vs. general intent had been resolved in an earlier lawsuit against the Attorney General. 972 S.W.2d at 491. The question the court resolved was whether, once the trust failed, the property reverted to the grantor's heirs at law or passed to her residuary legatee. Id. at 492-93.

The language in Vollmann required the use of the property "in perpetuity as a Rest Home, or Children's Home, and aforesaid property never to be sold." 972 S.W.2d at 491. Since the property could not be used for such purposes, the trust failed. In the instant case, the closing of the Dental School does not make the Development Fund useless. The University can use monies in that Fund to support its continued treatment of dental patients and post-graduate education in dental medicine.

Plaintiffs also rely on the Kansas Court of Appeals' decision in Estate of Coleman, 584 P.2d 1255 (Kan. App. 1978). Acknowledging that foreign precedent is not binding, Br. at 61, plaintiffs urge that this case is persuasive because "Kansas courts apply cy pres in the same manner as Missouri courts." Br. at 57.

Plaintiffs are wrong. In Missouri, plaintiffs must prove by clear and convincing evidence that Dr. Kimbrough had a specific charitable intent. Strother, 151 S.W. at 963. Applying Kansas law, Coleman holds exactly the contrary: the "entity which seeks application of the doctrine" of cy pres "has the burden of demonstrating . . . that the donor was possessed of a general charitable intent."

584 P.2d at 1263. Perhaps for that reason, no prior Kansas case had ever applied the doctrine of cy pres. Id. at 1262. Numerous Missouri cases apply the doctrine.

Coleman would not support reversal even if Kansas did apply the same legal standard as Missouri. In that case, the trial court found, as a matter of fact, that the charity "had failed to establish the testator's general charitable intent." 584 P.2d at 1263. The ultimate holding was that the "evidence presented at trial . . . was sufficient to support the trial court's determination." Id. Thus, Coleman merely deferred to the trial court's factual findings.

Moreover, there is a crucial difference in the record on the "crucial fact" on which plaintiffs rely: that the gift followed immediately upon the college's fund-raising drive:

> Dr. Coleman, being very active in his church's affairs during that period, was **without doubt aware** of and concerned about the financial plight of the college. The fact that his will was executed in 1965, shortly after the fund-raising campaign, bolsters the theory that he named the College of Emporia as a residuary legatee with the specific thought of aiding that single, particular Presbyterian college in its time of financial hardship.

584 P.2d at 1263 (emphasis added).

There is no direct evidence that Dr. Kimbrough amended his trust in 1955 in response to alumni solicitations; or that he knew that the Dental School was in need of money; or that he even knew the purposes of the Development Fund. Plaintiffs' argument that the evidence would have allowed the trial court to draw

such an inference, Br. at 61; 64; 74-75, is irrelevant. The trial court was not obliged to draw any such inference and in fact it did not:

> There was no evidence that Dr. Kimbrough wanted his gift so narrowly drawn and so inflexible that if it could not be used in a specifically named fund, it should lapse.

App. A12. On appeal, of course, the Court treats all inferences in the light most favorable to the judgment. H.M.C., 11 S.W.3d at 86.

Finally, the entity to which the gift was made in Coleman – the College of Emporia – ceased to exist. The party seeking cy pres was a wholly unrelated Presbyterian college. In the instant case, the entity to which the gift was made is the University, and the University remains in existence.

The trial court's finding that Dr. Kimbrough had a general charitable intent is a factual finding based on the unique circumstances of this case. Plaintiffs' attempt to secure de novo review by labeling those factual findings as errors of law will not wash.

B. Plaintiffs' Factual Arguments.

Plaintiffs have also raised a number of factual arguments to support their theory that Dr. Kimbrough would have preferred that the trust fail rather than be used to support dental education at University schools other than the Dental School. The defining characteristic of these arguments is that they seek to have

this Court reweigh the evidence and redraw the inferences. That is not an appropriate function for an appellate court.

For example, plaintiffs claim that other alumni of the Dental School "felt betrayed" by its closing, as evidenced by a decline in alumni contributions. Br. at 37-38; 76-77. From this, they deduce that it is "highly probable" that Dr. Kimbrough felt the same way. Br. at 37. They also claim that the University's decision to allow another donor to move his gift elsewhere is somehow proof of Dr. Kimbrough's intent. Br. at 38.

These arguments are quite illogical; the beliefs of other donors are in no way probative of Dr. Kimbrough's intent. As this Court held in Wollen v. DePaul Health Center, 828 S.W.2d 681 (Mo. banc 1992), even a statistically significant chance of survival by a cancer patient with prompt diagnosis "cannot tell whether the decedent would have survived if properly diagnosed." 828 S.W.2d at 685 (emphasis original):

> A specific individual, however, could be in either group. A jury could speculate as to which group a decedent would fall, but the statistical evidence – without more – does not give a jury a basis to believe that the decedent belongs to either the group that lives or the group that dies.

Id. at 686.

Even if Dr. Kimbrough would have felt betrayed by the closing of the Dental School, that does not mean he would have wanted the trust to revert to his distant heirs at law. Dr. Gilster has been a member of the Dental Alumni

Association ever since he graduated in 1944, Tr. 77, and he was "horrified" at the University's decision to close the Dental School. Tr. 110. Yet the Dental Alumni Association argued that Dr. Kimbrough had "a general intent" and that, using cy pres, the trial court "can apply the bequest of Dr. Kimbrough in a manner that would fulfill his general intent." Tr. 12. Thus, even the most vociferous supporters of the Dental School do not agree with plaintiffs.

Alternatively, plaintiffs claim that the University's decision to consult with live donors is somehow probative of Dr. Kimbrough's intent. Br. at 38. This is just as illogical as the previous argument. The more likely inference is that the University wanted to maintain good alumni relations.

Plaintiffs also argue that the University cannot invoke cy pres when its own deliberate act of closing the Dental School frustrated the grantor's purpose. Br. at 39-40. This argument begs the question. If, as the trial court held, Dr. Kimbrough had the general charitable intent of supporting education in dental medicine regardless of which school supplied it, closing the Dental School has not frustrated that general charitable purpose.

Plaintiffs argue that Dr. Kimbrough "made a conscious decision" not to follow form language the University prepared that would have expressly allowed the University to divert funds for other purposes. Br. at 54. There is no evidence that Dr. Kimbrough ever saw the form language, so it is sheer speculation to argue that he consciously decided not to follow it. The form appeared in the November 1959 Dental Journal, Tr. 72-73; 103, four years after Dr. Kimbrough amended his

trust to leave the remainder to the University. At best, this argument suggests an inference that the trial court was free to disbelieve.

Plaintiffs claim that Dr. Kimbrough's trust allowed the trustee to encroach on the principal to support the original beneficiaries. Br. at 55. Of course, that power was not dependent on the closing of the Dental School, so it says absolutely nothing about Dr. Kimbrough's intentions in the latter scenario.

Plaintiffs suggest that there were other University funds of broader purpose than the Dental Alumni Development Fund to which Dr. Kimbrough could have left his estate. They argue that the failure to select these funds is evidence of his specific intent. Br. at 72; 78. There is no evidence that Dr. Kimbrough was aware of these funds. Once again, the trial court was not required to credit the inference that plaintiffs seek to draw.

Plaintiffs argue that Dr. Kimbrough's sole affiliation with the University was with its Dental School and that he spoke only about the Dental School, not about the University. Br. at 73-74. Of course, the trial court was not required to credit the testimony that Dr. Kimbrough never spoke about the University. He graduated from the Washington University Dental School, Tr. 5; he taught at the Washington University Dental School, id.; he gave unrestricted gifts to Washington University, D.Ex. C-E; and he left the remainder of his trust to Washington University, not to its Dental School. Even if the inference plaintiffs seek to draw were reasonable, the trial court was not required to accept it.

Plaintiffs' final salvo is that the purposes for which the trial court directed the estate be used are not "necessarily" related to dental medicine. Br. at 77. Since plaintiffs have no interest in the distribution of the remainder of Dr. Kimbrough's trust, they have no standing to make that argument. State ex rel. Nixon v. Hutcherson, 96 S.W.3d 81, 85 (Mo. banc 2003).

In any event, there is substantial evidence in the record that the University continues both to practice and to teach dental medicine. In the Cleft Palate Institute, Dr. Huebener testified that he does the same things today in the School of Medicine that he did at the Dental School. Tr. 169-70. He teaches general practice residents in dentistry and dental interns. Tr. 170; 182. In the Otolaryngology department, Dr. Gay also testified that "what I do now is exactly what I did at the Dental School." Tr. 287.

None of plaintiffs' multifarious factual challenges to the judgment has any merit.

Conclusion

For the foregoing reasons, Washington University respectfully submits that the Court should affirm the trial court's judgment.

Respectfully Submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 9,256 words, exclusive of the sections exempted by Rule 84.06(b)(2) of the Missouri Supreme Court Rules, based on the word count that is part of Microsoft Word 2002 SP-2. The undersigned counsel further certifies that the diskette has been scanned and is free of viruses.

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Certificate of Service

The undersigned certifies that on the 5th day of February, 2004, a true and accurate copy of the foregoing and one diskette copy were mailed, postage prepaid or hand delivered, to:

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